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No. 96-541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

In re THE HONORABLE THOMAS L. STEFFEN, Chief Justice, Nevada Supreme Court, and THE HONORABLE CHARLES E. SPRINGER, Associate Justice, Nevada Supreme Court,

Petitioners.

OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED

I. Whether the contention that judges who have recused themselves in one case are required to recuse themselves in a different case raises a substantial question under the Due Process Clause of the Fourteenth Amendment.

II. Whether the Petition is procedurally barred because (a) no federal question was raised in the proceedings below, (b) petitioners lack standing to bring this action, (c) the disqualification issue was waived, and (d) the petition is untimely.

PARTIES TO THE PROCEEDING AND RELIEF SOUGHT

A. Parties. The parties are as listed at page ii of the Petition, except that the Honorable C. Clifton Young, the Honorable Robert Rose, the Nevada Commission on Judicial Discipline and former District Court Judge Jerry Carr Whitehead were not parties to the proceeding below (Case No. 27847).

B. Relief Sought. Respondent Frankie Sue Del Papa, Attorney General of the State of Nevada, seeks dismissal of this Petition as untimely and for failure to present a federal question.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO. 96-541

In re The Honorable Thomas L. Steffen,
Chief Justice, Nevada Supreme Court, and
The Honorable Charles E. Springer,
Associate Justice, Nevada Supreme Court,
Petitioners

Opposition to Petition for Writ of Mandamus or Prohibition or, in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada

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Respondent Attorney General Frankie Sue Del Papa requests that the Court deny the petition for a Writ of Mandamus or Prohibition or, in the Alternative, for a Writ of Certiorari seeking review of an opinion of the Supreme Court of the State of Nevada. The Nevada Supreme Court opinion was entered in *Del Papa v. Steffen, et al.*, and is reported at 920 P.2d 489, filed July 12, 1996. For the convenience of the Court, all citations to the opinion will be to Petitioners' Appendix A, 1a.

STATEMENT OF JURISDICTION

The Petition for Writ of Certiorari is not timely and therefore the Court does not have jurisdiction under Supreme Court Rule (Sup. Ct. R.) 13 and 28 U.S.C. 2101(c). This Court cannot properly exercise jurisdiction pursuant to 28 U.S.C. § 1257(a), since there is no federal question at issue and Petitioners failed to present a federal question for review to the Nevada Supreme Court. 28 U.S.C. § 1651(a) is not a grant of jurisdiction and writs in aid of jurisdiction may issue only where this Court may otherwise properly exercise jurisdiction.

OPINION BELOW

In the proceedings below, the opinion granting a writ of prohibition against Petitioners was entered on April 25, 1996 (Petitioners' App. G, at 133a) and is reported at 915 P.2d 245. Petitioners seek review of a July 12, 1996 opinion (Petitioners' App. A, at 1a), reported at 920 P.2d 489, which reaffirmed the final judgment and decision entered on April 25, 1996.

STATEMENT OF THE CASE

Respondent, Frankie Sue Del Papa, Attorney General of the State of Nevada, respectfully opposes the petition for a writ of mandamus or prohibition or, in the alternative, for a writ of certiorari. The petition is fatally flawed for a number of reasons: the petition is not timely; the petition does not present a federal question; and the petitioners have no standing since they have not suffered a personal injury which can be remedied by the Court. Petitioners have failed to address the criteria for certiorari review contained in Sup. Ct. R. 10. This failure is symptomatic of the meritless nature of this petition, which when reduced to its essence is simply a request to have this honorable Court act as a supervisor of a state supreme

court and decide matters of state law in accordance with the personal views of Petitioners.

A. Course of Proceedings and Disposition of the Case Below.

On December 21, 1995, Attorney General Frankie Sue Del Papa filed for a Writ of Prohibition or in the Alternative for a Writ of Mandamus in the Nevada Supreme Court, Case No. 27847, 112 Nev. 369, 915 P.2d 245 (1996). Respondent's Appendix A. The Attorney General requested that the Nevada Supreme Court prohibit Justices Steffen and Springer, Senior Justice David Zenoff, and special investigator Herbert J. Ahlswede from conducting an unlawful and unconstitutional investigation into media sources and others responsible for what Respondents, Petitioners herein, characterized as "the causes for the loss of public confidence, trust and respect for the [Nevada] Supreme Court and for the judicial system . . . ." Respondent's App. A, at 2a, 5a-6a. The *Del Papa* petition sought a ruling from the Nevada Supreme Court that under state law and constitution, the lawful jurisdiction of the Nevada Supreme Court does not encompass wide-ranging investigations into the sources of disparaging news stories and other negative commentary about the court.

Petitioners Steffen and Springer had appointed a special master to conduct an investigation in an order filed September 1, 1995, in Case No. 24598. Petitioners' App. D, at 85a-94a. Although Petitioners assert that they were concerned with the due-process rights of litigants, it is apparent that the ultimate goal of the proposed investigation was to identify and punish the Petitioners' detractors and the sources of negative press. Petitioners' App. C, at 25a-29a; D at 89a. The order appointing the special master imbued the master with extraordinary and unprecedented powers and immunities. These included the power:

1. To carry out on behalf of the panel all discovery proceedings that are provided for and authorized by the Nevada Rules of Civil Procedure and the rules of this court.

2. To administer oaths or cause oaths to be administered to all persons examined at depositions or otherwise by the Special Master.

3. To request and to have issued by the Clerk of the Supreme Court, such subpoenas and subpoenas *duces tecum* that the Special Master of the Whitehead panel of the Supreme Court shall deem necessary to carry out the duties herein assigned to him by the court.

4. To petition the *Whitehead* panel of the Supreme Court, to issue orders to show cause or other appropriate orders, whenever such orders are deemed necessary by the Special Master or the panel to carry out the purposes of this order.

5. To submit vouchers to the Chief Justice on a weekly basis for approval and payment. . . .

Id. at 89a-90a.

The order went on to cloak the master in immunity:

> It is further ordered that in all proceedings conducted by the Special Master, the Special Master shall enjoy judicial immunity as an agent and officer of the *Whitehead* panel of the Supreme Court.

Id. at 90a.

Thus, the master was specifically authorized to seek contempt orders against individuals in the course of the proposed investigation. The punitive intent of this investigation was further revealed in the order appointing the master:

> We fully understand the concerns expressed by our Legislature which indeed underscore the extent of the damage to the Nevada Supreme Court and the Nevada judiciary by sources as yet unexposed, and the need to expose and hold accountable said sources as the only effective means of restoring public respect for this court and the Nevada judicial branch of government.

Id. at 86a.

The lack of judicial authority under Nevada law to conduct such an investigation and the numerous constitutional defects and other violations of law entailed in this unprecedented venture were thoroughly briefed in the petition for writ of prohibition filed by Respondent Del Papa below. Respondent's App. A, at 1a-28a. Respondent Del Papa argued that through the appointment of the master, the Petitioners improperly assigned to themselves investigative, prosecutorial and judicial powers. *Id.* at 20a-24a.

Although the Nevada Supreme Court had made no order under Nev. R. App. P. 21(b) directing a response to Del Papa's petition, on December 22, 1995, Petitioner Springer filed a "Response to the Petition," and a motion to disqualify Justices Young, Rose, and Shearing from considering the *Del Papa* petition. Respondent's App. B, at 131a. On December 26, 1995, the Nevada Supreme Court entered an order striking portions of Springer's response and denying the motion to disqualify based on Springer's failure to submit supporting affidavits, proof of service on opposing counsel, and a brief of legal points and authorities, all of which are required by Nevada Rule of Appellate Procedure (Nev. R. App. P.) 35. Respondent's App. C, at 141a. Petitioner Springer elected not to cure these procedural and substantive deficiencies.

Petitioners Steffen and Springer filed their response to the *Del Papa* petition on January 29, 1996. Respondent's App. D, at 144a. Petitioners again requested that Justices Young, Rose, and Shearing disqualify themselves, but again failed to file a formal motion for disqualification in accordance with the requirements of Nev. R. App. P. 35. Notably, Petitioners neglected to raise the federal due-process issue under *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813 (1986), which they have framed as the question presented by this petition.

On April 25, 1996, the Nevada Supreme Court granted Del Papa's petition for a writ of prohibition. Petitioners' App. F, at 110a-132a. The Nevada court ruled that there was no

> constitutional or legislative authority to appoint a special master to investigate the leaks of information to the press regarding secret proceedings. Accordingly, we grant Petitioner's petition for a writ of prohibition to the Respondents [Steffen, Springer, Zenoff, and Ahlswede] directing them to cease and desist from any further action in the investigation launched in Supreme Court Case No. 24598 by the appointment of a special master to determine the source of news leaks and the reason for this court's lost prestige.

Id. at 132a.

The opinion was signed by Justices Cliff Young, Robert Rose, and Miriam Shearing. Thereafter, the writ issued, was served on the respondents below, and returned to the Nevada Supreme Court on May 16, 1996. *See* Respondent's App. E, at 168a. Petitioners did not file a petition for rehearing of this judgment.

Choosing to ignore the writ of prohibition issued against them, Petitioners Steffen and Springer filed a two-judge

opinion in *Whitehead v. Nevada Commission on Judicial Discipline,* Case No. 24598, in which they declared the *Del Papa* writ of prohibition void. Petitioners' App. G, at 133a-186a. On July 12, 1996, the three justices who had issued the *Del Papa* writ issued another opinion, which did not alter the April 25, 1996, opinion and writ in its application to or impact on Petitioners. Only the clerk of the court and the appointed special master were ordered to take certain actions in the July 12, 1996, opinion, and an administrative docket order which previously voided the appointment of the special master is "incorporated by reference." Petitioners' App. 1a-6a.

In the July 12, 1996, opinion, the majority of the Nevada Supreme Court clarified that the writ issued on April 25, 1996, did not affect the outcome and relief afforded former district court judge Jerry Carr Whitehead in *Whitehead v. Nevada Commission on Judicial Discipline,* stating:

> (2) That the *Whitehead* panel gave to petitioner Whitehead the original relief sought in his petition for extraordinary relief and the undersigned majority have in no way attempted to amend, restrict or change that relief.
>
> (3) That any action of the *Whitehead* panel after granting petitioner [Whitehead] the original relief sought in his petition was extra-jurisdictional in nature.

The time for perfecting a certiorari petition to the United States Supreme Court ran from April 25, 1996, the day the writ was issued. The instant Petition was filed on October 7, 1996, 165 days after the granting of the writ of prohibition in the proceedings below. The case below was brought against Petitioners Steffen and Springer in their official capacities and thus, their personal rights were not affected. Respondent's Appendix A, at 1a.

B. Correction of Misstatements in the Petition.

Pursuant to United States Sup. Ct. R. 15.1, respondent brings to the Court's attention the following misstatements of fact contained in the petition. We have limited ourselves to correcting misstatements of fact relevant to the issue before this Court. There are many other misstatements on irrelevant matters.[1]

Petitioners misstate at page 3 of the Petition that Respondent Del Papa "sought to vacate a substantial portion of the rulings and relief entered in *Whitehead*." On the contrary, Respondent Del Papa, although recognizing that the unlawful conduct of Petitioners Steffen and Springer arose out of the *Whitehead* case, specifically limited the issues presented in her petition so as not to affect the relief afforded to Whitehead:

> This Petition does not place before the Court any substantive issue in Case No, 24598 [*Whitehead]*. Indeed all substantive issues in Case 24598 have long since been decided. That case was concluded and a writ granted by opinions[sic][2] issued on September 9, 1994 and

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[1] Since the integrity of the Attorney General's office and two members of the Supreme Court are impugned, we cannot let go unanswered the statement at page 10 of the Petition suggesting that those persons divulged confidential information. Nothing in the record of any of the proceedings before the Nevada Supreme Court lends the slightest credence to this accusation. The deposition of Pat Lundvall is devoid of any evidence to support the accusation. At the urging of the special master, Ms. Lundvall merely engaged in speculation and innuendo without factual foundation. Petitioners' App. H.

[2] On September 9, 1994, the *Whitehead* panel issued an unpublished order granting former judge Whitehead's petition and Whitehead had entered into an agreement with the United States government, in which he declared his intent to retire and agreed never to hold state judicial

February 24, 1995. This Petition presents to this Court purely legal issues regarding the lawful boundaries of jurisdiction and judicial authority.

SUMMARY OF ARGUMENT

There is no substantial question under the Fourteenth Amendment. Petitioners misread a single sentence in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827-28 (1986), as meaning that it is a violation of the Due Process Clause for a judge who has recused to reenter the case and cast the deciding vote. There was no such issue in *Aetna*, where the judge whose participation was held improper had never recused at any stage. And *Aetna* makes it clear that the Due Process Clause demarks only the outer boundaries of judicial disqualification. Most matters of disqualification are left to Congress or, in a case like this, to the legislature and courts of the state.

Even if there were a federal question in Petitioners' claim, it cannot be heard here. It was never raised by them in the proceeding below. Petitioners, whose only interest in the case is as judges who were on the losing side of the decision, lack standing to seek review here. Any question of disqualification was waived by the failure of Petitioners to follow the procedures established by Nevada law for seeking the disqualification of a justice of the state supreme court. Finally, to the extent that Petitioners are asking for a writ of certiorari, they are out of time. They purport to be challenging the July 12, 1996, order of the Nevada Supreme Court, but it did not alter in any way the earlier order of April 25, 1996. The petition was filed on October 7, 1996, 165 days after the granting of the writ of prohibition in the proceeding

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office again in order to avoid further investigation and possible prosecution on federal offenses. Respondent's App. G, at 176a.

below. It is far outside the 90-day limit on certiorari petitions established by 28 U.S.C. § 2101(c).

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT RAISE A SUBSTANTIAL QUESTION UNDER THE FOURTEENTH AMENDMENT.

As Petitioners pose the question they are seeking to bring to this Court, it is whether "the Fourteenth Amendment's Due Process Clause can 'permit[] a court's decision to stand when a disqualified judge casts the deciding vote.' *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 827-28 (1986)." But there is nothing whatever in the Due Process Clause that says whether a state-court judge can vote in circumstances such as those presented here and nothing whatever in the *Aetna* case that supports their position.

Aetna is the single case on which Petitioners rely. Their reliance is misplaced. *Aetna* does not support a constitutional due-process basis for this Court to review a state-court decision. Petitioners derive great comfort from the sentence at 827-28 in which Chief Justice Burger, for the Court, said: "But we are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote." They quote that sentence, in whole or in part, at pages i, 1, 3, 16, 20, and 23 of the petition and they cite those pages in the *Aetna* opinion at pages 3, 16, and 24. They interpret that as meaning that once a judge has recused himself he may not reenter a case. They say this in so many words at page 16 of the petition: "[O]nce judges are recused from considering the merits of a matter, they may not thereafter alter the outcome of that case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827-28 (1986)."

But *Aetna* does not support the interpretation they put on it. The issue they are arguing did not arise in *Aetna*. Justice Embry, who wrote the 5-4 per curiam decision of the Alabama Supreme Court in the case, never recused himself at any time. The question of recusal was raised for the first time in two motions by the losing insurance company while its application for rehearing of the court's decision was still pending before the court. The Alabama court unanimously denied the recusal motions and, by the same 5-4 vote as in its original decision, denied the motion for rehearing. Two weeks later the insurance company obtained a copy of Justice Embry's deposition in connection with his suit against Blue Cross, a suit that raised the same issue as did the case in which he had written the court's decision. The insurance company moved for leave to file a second application for rehearing based on the deposition, but that motion was denied. The insurance company then appealed to this Court. It held that Justice Embry's participation in the case violated the insurance company's due-process rights and remanded the case to the Supreme Court of Alabama for further proceedings.

Aetna says nothing about whether a state-court judge who has once recused himself or herself can return to the case at a later stage. That is wholly a question of state law on which the state court has spoken with final authority. And generally it is for state courts or legislatures to decide when recusal is required. There is a federal question, and this Court has power to act, only in those situations in which the Constitution requires disqualification. "The Due Process Clause demarks only the outer boundaries of judicial disqualification. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today." *Aetna*, 475 U.S. at 828.

Earlier in the *Aetna* opinion Chief Justice Burger, writing for the Court, had emphasized the limited role the Due Process Clause plays on questions of disqualification:

> The Court has recognized that not "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumey v. Ohio,* 273 U.S. 510, 523, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927); see also *FTC v. Cement Institute,* 333 U.S. 683, 702, 68 S.Ct. 793, 804, L.Ed. 1010 (1948) ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level"). Moreover, the traditional common-law rule was that disqualification for bias or prejudice was not permitted. See, *e.g., Clyma v. Kennedy,* 64 Conn. 310, 29 A. 539 (1894). See generally, Frank, Disqualification of Judges, 56 Yale L.J. 605 (1947).
>
> . . . .
>
> The more recent trend has been towards the adoption of statutes that permit disqualification for bias or prejudice. See *Berger v. United States,* 255 U.S. 22, 31, 11 S.Ct. 230, 232, 65 L.Ed. 481 (1921) (enforcing statute disqualifying federal judges in certain circumstances for personal bias or prejudice). See also ABA Code of Judicial Conduct, Canon 3C(1)(a) (1980) ("A judge should disqualify himself . . . where he has a personal bias or prejudice concerning a party.") But that alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.

Aetna, 475 U.S. at 820.

Chief Justice Burger, for the Court, went on to say that it did not need to decide

> whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal. Certainly only in the most extreme cases would disqualification on this basis be constitutionally required, and appellant's arguments here fall well below that level.

Id. at 821.

Justice Embry was disqualified in the constitutional sense not because of his possible bias, but because he had an interest in the case and "his interest was 'direct, personal, substantial, [and] pecuniary,' *Ward, supra,* 409 U.S., at 60, (quoting *Tumey v. Ohio*, 273 U.S., at 523)." *Aetna,* 475 U.S. at 824.

The reasons that Justice Rose and Justice Young recused themselves, as stated in note 2, at page 9 of the Petition, do not amount to a direct, personal, substantial, and pecuniary interest in the case. If they showed bias—and if that bias would still have been present at the time of the September 15th, April 25th, and July 12th orders, when the issues were quite different from those presented at earlier stages in a separate and distinct case—it would fall well below the level of bias in which disqualification would be constitutionally required.

On the basis of the analysis provided in *Aetna* it is clear that the Due Process Clause is not implicated in any manner and there is simply no constitutional basis upon which to establish jurisdiction in this Court.

II. THE PETITION IS PROCEDURALLY BARRED.

Even if the Petition presented a federal question, it could not be heard here because of procedural deficiencies. The supposed federal question was never raised in the proceeding below. Petitioners lack standing to raise the issue. Petitioners failed to raise the question of disqualification of judges by the procedure required under Nevada law. And insofar as the Petition is for a writ of certiorari, it is untimely.

A. No Federal Question Was Raised in the Court Below.

"The threshold procedural requirement for Supreme Court review is that the tendered federal questions have been presented to the state courts. Many decisions announce the rule that the Supreme Court will not consider questions that are raised for the first time in seeking review of completed state proceedings." 16 WRIGHT, MILLER, COOPER & GRESSMAN, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4022 at 696 (1977). *E.g., Webb v. Webb*, 451 U.S. 493, 495 (1981); *Illinois v. Gates*, 462 U.S. 213, 217-24 (1983).

The federal question that Petitioners seek to present in their Petition was never raised in the Nevada Supreme Court. The Response to Petitioners and two others to the *Del Papa* petition for a writ of prohibition fills 24 pages in the appendix. Respondent's App. D. In that document Petitioners cite CORPUS JURIS SECUNDUM for the proposition that it is "clear black-letter law" that a disqualified judge cannot act further in the case. But nowhere in that lengthy response do they make any reference to the Constitution of the United States. Nowhere do they cite this Court's decision in *Aetna*, which is the sole basis for the contention they make here.

That Response was filed January 29, 1996. On April 25, 1996, the Nevada Supreme Court granted the petition for a writ of prohibition. It is that writ that Petitioners challenge here. On July 5th Petitioners entered what purports to be a Supplemental Opinion in the original *Whitehead* case. In that document they purport to declare void and illegal the April 25, 1996, order of the Nevada Supreme Court. Petitioners' App. G. In the 38 pages of the July 5th document there is no reference to the Constitution of the United States. There is a bare use of the words "right of due process" but without explanation or without indicating its legal basis in the final sentence of the document. Petitioners' App. G, at 171a. There is no claim that the participation of Justices Rose and Young in the decision granting the writ of prohibition violated the Due Process Clause of the Fourteenth Amendment. There is a reference to the *Aetna* case in one paragraph, Petitioners' App. G., at 155a, but no suggestion that *Aetna* was announcing a constitutional rule applicable to the present case.

Because no federal question was raised in the state court the Petition presents nothing that this Court can consider.

B. Petitioners Do Not Have Standing to Assert a Due Process Violation.

Petitioners Steffen and Springer, as the parties attempting to invoke the federal judicial power for the first time in the lawsuit, must have standing to do so. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-18 (1989). They fail this test.

Petitioners have not satisfied the requirement that they must have personally suffered some actual or threatened injury. In fact, the Question Presented by the Petitioners, "[w]hether the nationwide system of justice governed by the Fourteenth Amendment's due Process Clause can 'permit [] a court's decision to stand when a disqualified judge casts the deciding vote" is itself an "abstract" question the wide public signifi-

cance of which might more appropriately be addressed in the "rarified atmosphere of a debating society." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 475 (1982). *Cf. Allen v. Wright*, 468 U.S. 737, 754 (1984) (an asserted right to have the government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223, n.13 (1974) (allegation of "the abstract injury in nonobservance of the Constitution" insufficient to confer standing). The "injury" asserted in the Petition is simply that Petitioners have been outvoted in their official capacities as justices of the court and prevented, also in their official capacities, from conducting an investigation. Numerous authorities support the conclusion that such an "injury" is insufficient to confer standing.

In *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 543-44 (1986), a group of high-school students sued a school district and various individuals in their official capacities, alleging First Amendment violations. The students prevailed. The school district did not challenge the judgment and took no appeal. One member of the board did, however, file a notice of appeal. *Id.* at 539. The question before the Court was whether one member of a school board had standing to appeal from a declaratory judgment against the board. The Court concluded that, because the judgment against the board member was not in his individual capacity, he had no standing to appeal in that capacity, and, conversely, "as a member of the School Board sued in his official capacity Mr. Youngman has no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal." *Id.* at 543-44.

In *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980), neither the city nor its council members had standing. The city and council members alleged that the CTRPA's land-use

regulations and regional and transportation plans were unconstitutional. *Id.* at 232-33. The council members alleged that voting to enforce the regulations would violate their oaths of office to uphold the U.S. Constitution and expose themselves to civil liability, and that failure to enforce the regulations could result in personal criminal liability for their willful failure to perform their duty. *Id.* at 233. The court found no concrete injury resulting from the operation of the challenged ordinances. *Id.* at 238. Although constitutional principle divorced from concrete injury might "generate a spirited legislative or public debate," it would not support a federal case. The "official" rather than "personal" interest of the council members and their "abstract" rather than "concrete" injuries rendered their claim to standing deficient. Until a victim of the law's unconstitutional enforcement, in this case most clearly a landowner, chose to knock, the courthouse door would be barred. *Id.*

In *D'Amico v. Schweiker*, 698 F.2d 903 (7th Cir. 1983), seven administrative law judges (ALJ) of the Social Security Administration (SSA) sought an injunction against an instruction issued by the SSA to its ALJs. The ALJs had not suffered an actual or threatened injury such as reducing their pay or benefits for which they would have had standing to sue. *Id.* at 905. The court concluded that despite the ALJs' emotional stake in the case, "they are the wrong people to be raising with us the question whether the challenged instruction is lawful." *Id.* at 906. If the instruction hurt recipients of disability benefits, as the ALJs contended, "we can expect one or more of them to challenge its lawfulness in a suit in federal district court . . . ." *Id.*

In *Cronson v. Clark*, 810 F.2d 662 (7th Cir. 1987), Cronson, the Auditor General of Illinois, brought suit against the justices of the Supreme Court of Illinois and other officials. He asserted he had a legal duty under Illinois law to conduct a "full" audit of the supreme court. The Illinois Supreme Court disagreed as to the scope of his audit. When Cronson

refused to do a partial audit, the administrator of the Illinois court system filed a mandamus proceeding in the supreme court to compel Cronson to perform the partial audit. Cronson contended the proceeding violated his rights under the due process clause because the supreme court was acting as a judge in its own cause. *Id.* at 664.

The court pointed out that Cronson, in order to have standing in federal court, must show more than a violation of law; he must show the kind of actual or threatened injury that would support a lawsuit under traditional principles of common law or equity. *Id.* The court concluded the Due Process Clause did not confer on Cronson a right to conduct a more extensive audit of the Supreme Court of Illinois, and therefore he had suffered no injury on which the action could be based. "The federal court," it said, "do not sit to resolve intramural disputes among state officials over the bounds of their authority under state law." *Id.* at 665.

Petitioners have suggested no injury, either actual or threatened, such as would confer standing on them. They do not even assert personal injury. They have pointed to no victim of the conduct they characterize as unlawful other than the "nationwide system of justice." The question they have presented for review is an abstract conundrum posed in a vacuum. Like the school board member in *Bender*, the Petitioners, having been sued in their official capacities, have no personal stake in the outcome of the litigation. Like the ALJs in *D'Amico* and the council members in *City of South Lake Tahoe*, the Petitioners are the wrong persons to bring such an action before this Court; any person actually harmed by the conduct complained of would have standing, at least in federal district court. Finally, like the Auditor General in *Cronson*, the justices have merely alleged a violation of the law in being prevented from acting to the full extent of what they conceive to be their powers under state law. They can point to no deprivation of life, liberty, or property and this is a precondition to complaining of a denial of due process under the Fifth

and Fourteenth Amendments. Accordingly, Petitioners have no standing to bring this action.

C. Petitioners' Failure to Follow Established Nevada Supreme Court Procedures for Seeking Disqualification of a Justice Precludes Further Consideration of this Matter.

Nevada Rule of Appellate Procedure 35, adopted effective May 25, 1990, sets forth a specific procedure for seeking disqualification of a Nevada Supreme Court Justice. Nev. R. App. P. 35(a) cautions that: "Any ground for disqualification or recusal of a supreme court justice that is not raised in a timely manner through the filing of a formal motion or charge shall be deemed waived." Nev. R. App. P. 35(a) and (b) require the movant to file an affidavit or affidavits made upon personal knowledge supporting each and every fact alleged and a supporting brief of legal points and authorities. Further, the attorney making the motion must certify that he or she has read the motion or charge and supporting documents, and that based on personal investigation the attorney believes all grounds asserted to be legally valid and all factual allegations to be true. Thereafter, all adverse parties have ten days to file opposition to the motion, and the moving party may seek leave to file a reply.

Upon the filing a motion for disqualification, the opposition thereto, and any reply, Nev. R. App. P. 35(d) states that the motion will be decided, without further written submission from the parties. A formal motion for disqualification, supported by affidavits and legal points and authorities, should have been submitted.

Petitioners elected not to follow the Nev. R. App. P. 35 disqualification procedures they helped to establish in 1990, and thus failed to properly present and preserve their claim that Justices Rose and Young were barred from participating in the resolution of the *Del Papa* petition. Instead of

submitting formal motion and permitting the state supreme court to rule upon the matter, Petitioners elected simply to decree in their two-justice "per curiam" opinion issued July 5, 1996, that Justices Rose and Young were disqualified, and that any action taken by such justices regarding the *Del Papa* petition was null and void.

Many appellate courts have considered the issue of a litigant's failure to seek, through the submission of appropriate motions and affidavits, the disqualification of a judge in the lower court, and have concluded that a litigant's failure to raise the point in the lower court, and to follow established procedures for seeking disqualification, precludes consideration of the matter on appeal. *See, e.g.*, *Baker v. Mueller*, 222 F.2d 180, 183 (7th Cir. 1955); *United Companies Financial v. Wyers*, 518 S.2d 700, 702 (Ala. 1987); *Hermann v. Summer Plaza Corp.*, 513 A.2d 1211, 1217 (Conn. 1986); *Homestead Development Co. v. Holly Tp.*, 443 N.W.2d 385, 390 (Mich. App. 1989); *Henrickson v. Lyons*, 652 P.2d 18, 21 (Wash. App. 1982); *Matter of Estate of Baird*, 408 N.E.2d 1323, 1331 (Ind. App. 1980); *Bonnet v. Stewart*, 382 A.2d 930, 932 (N.J. Super. Ct. App. Div. 1978).

Because Petitioners failed to assert their claims of disqualification through proper procedures, Attorney General Del Papa was never afforded the opportunity to oppose Petitioners' claim under that Justices Rose and Young were disqualified from entertaining Del Papa's petition. No record on the issue was developed in the Nevada Supreme Court, and the state supreme court was never afforded the opportunity to decide the issue. Accordingly, Attorney General Del Papa submits that Petitioners should not be permitted to ignore their own duly adopted procedures, and that this Court should refuse to entertain the issue at this late date.

D. The Petition is Untimely.

The Petition asks for writ mandamus or prohibition or, in the alternative, for a writ of certiorari. To the extent that the petition seeks a writ of certiorari it is out of time. Section 2101(c) of Title 28 provides that any writ of certiorari in a civil action shall be applied for "within ninety days after the entry of judgment or decree." The 90-day limit is mandatory and jurisdictional. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). *See also*, Sup. Ct. R. 13(1) and (2).

Initially, the Nevada Supreme Court entered an order on September 15, 1995, on its administrative docket, ADKT No. 221. Petitioners' App. B. This order held: "We therefore declare void the 'Order Appointing Special Master' entered in Docket No. 24598, and hereby prohibit the payment of any cost or expenditure associated with the appointment of said special master/prosecutor." Petitioners' App. B, at 8a. The order was signed by Respondent Justices Young and Rose, and by Justice Shearing.

Thereafter, on April 25, 1996, the Nevada Supreme Court issued a formal opinion granting Respondent Del Papa's petition for writ of prohibition, in Case No. 27847. Petitioners' App. F. This opinion held:

> Respondent Justices [Steffen and Springer] lacked constitutional or legislative authority to appoint a special master to investigate the leaks of information to the press regarding the secret proceedings.

Petitioners' App. F, at 132a.

This opinion further ordered the court clerk to issue a writ of prohibition directing Justices Steffen and Springer to:

> cease and desist from any further action in the investigation launched in Supreme Court Case No. 24598 by the appointment of a special master to determine the source of news leaks and the reason for this court's lost prestige.

Id. This opinion was a final, published opinion of the Nevada Supreme Court and is reported as *Attorney General v. Steffen*, 112 Nev. 369, 915 P.2d 245 (1996).

The opinion that Petitioners assert is the subject of the instant Petition was issued on July 12, 1996, also in Case No. 27847. Petitioners' App. A. This opinion was entered following the issuance by Steffen and Springer of a so-called "*per curiam*" opinion July 5, 1996, in Case No. 24598 purporting to vacate the Nevada Supreme Court opinion entered April 25, 1996. In the opinion entered July 12, 1996, the Court reiterated:

> [T]he special master is cloaked with judicial immunity and his activities are to be supervised only by the panel. Such a situation would place investigatory (i.e. executive) power and adjudicative power into the hands of a panel of this court, thereby presenting a situation which this court has previously disallowed because it would permit the panel to act oppressively.

Petitioners' App. A, at 3a.

The July 12, 1996, opinion incorporated the September 1995 administrative docket order: "We incorporate by reference our former order of September 15, 1995, declaring void each and every provision of the 'Order Appointing Special Master' which was filed by the *Whitehead* panel on September 1, 1995." Petitioners' App. A, 5a. The July 12, 1996, opinion did not alter or affect the relief which was granted to Attorney General Del Papa on April 25, 1996. As

noted above in Respondent's factual statement, only the clerk of the court and the special master are ordered to take certain actions in the July 12, 1996, opinion.

Where a lower court issues successive judgments in the same case, as occured here, the 90-day period commences at the time of the filing of the first judgment. It is only if the lower court has changed matters of substance, or resolved a genuine ambiguity, in a judgment previously rendered that the period for bringing a case here begins to run anew. *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952). Put another way: "If the court did no more by the second judgment than to restate what it had decided by the first one . . . the 90 days would start to run from the first judgment." *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 910, 920 (1952).

Petitioners have acknowledged that the July 12, 1996, opinion entered in Nevada Supreme Court Case No. 27847 is no more than a reiteration of the court's holding in its April 25, 1996, opinion in the same case. In their Petition they say:

> The Mandamus Order signed by two recused justices of the Nevada Supreme Court (App. A 1a) is reported at 920 P.2d 489. That Order *reaffirms* an earlier unreported administrative order dated September 15, 1995 (App. B 7a) and an opinion dated April 25, 1996 (App. F 110a) reported at 915 P.2d 245.

Petition, at 2 (emphasis added).

Petitioners misleadingly assert that the "mandamus order" was entered against them on July 12, 1996:

> On July 12, 1996, Justices Rose, Young and Shearing filed the disputed Mandamus Order.

> Regardless of the due process obligation to refrain from deciding *Whitehead*, the disqualified justices reaffirmed their April 25, 1996, reversal of that opinion . . . . Citing as precedent — not any authoritative opinions by the state's highest court — but only their own April 25, 1996, opinion reversing the Nevada Supreme Court's confidentiality rulings in *Whitehead*. . . .

Petition, at 13.

The opinion of July 12, 1996, is not a "mandamus order." It is neither styled "mandamus order," nor does it contain any indication that it is intended as a grant of "mandamus" relief. It orders no relief against Petitioners. There can be no doubt that the writ of prohibition against Petitioners was granted and issued on April 25, 1996. Petitioners' assertion that the "disputed Mandamus Order" was filed on July 12, 1996, strains credulity and is a transparent attempt to avoid the 90-day time bar.

Respondents submit that the July 12, 1996, opinion, which is the subject of the instant petition for writ of certiorari, does not disturb or revise legal rights or obligations that were settled in the April 25, 1996, opinion granting writ of prohibition. The July opinion is but a restatement of the earlier opinion or, to use the term chosen by Petitioners, the July opinion merely "reaffirmed" the earlier, April opinion. Under the holdings of *Minneapolis-Honeywell Regulator Co.* and *Idaho Power Co.*, Petitioners' 90-day period to apply for the instant writ of certiorari commenced at the date of the first judgment, April 25, 1996. That 90-day period ended on July 24, 1996. Accordingly, the instant petition for writ of certiorari, being filed on October 7, 1996, is time-barred and should be dismissed.

CONCLUSION

The Petition should be denied in all respects.

Respectfully submitted,

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